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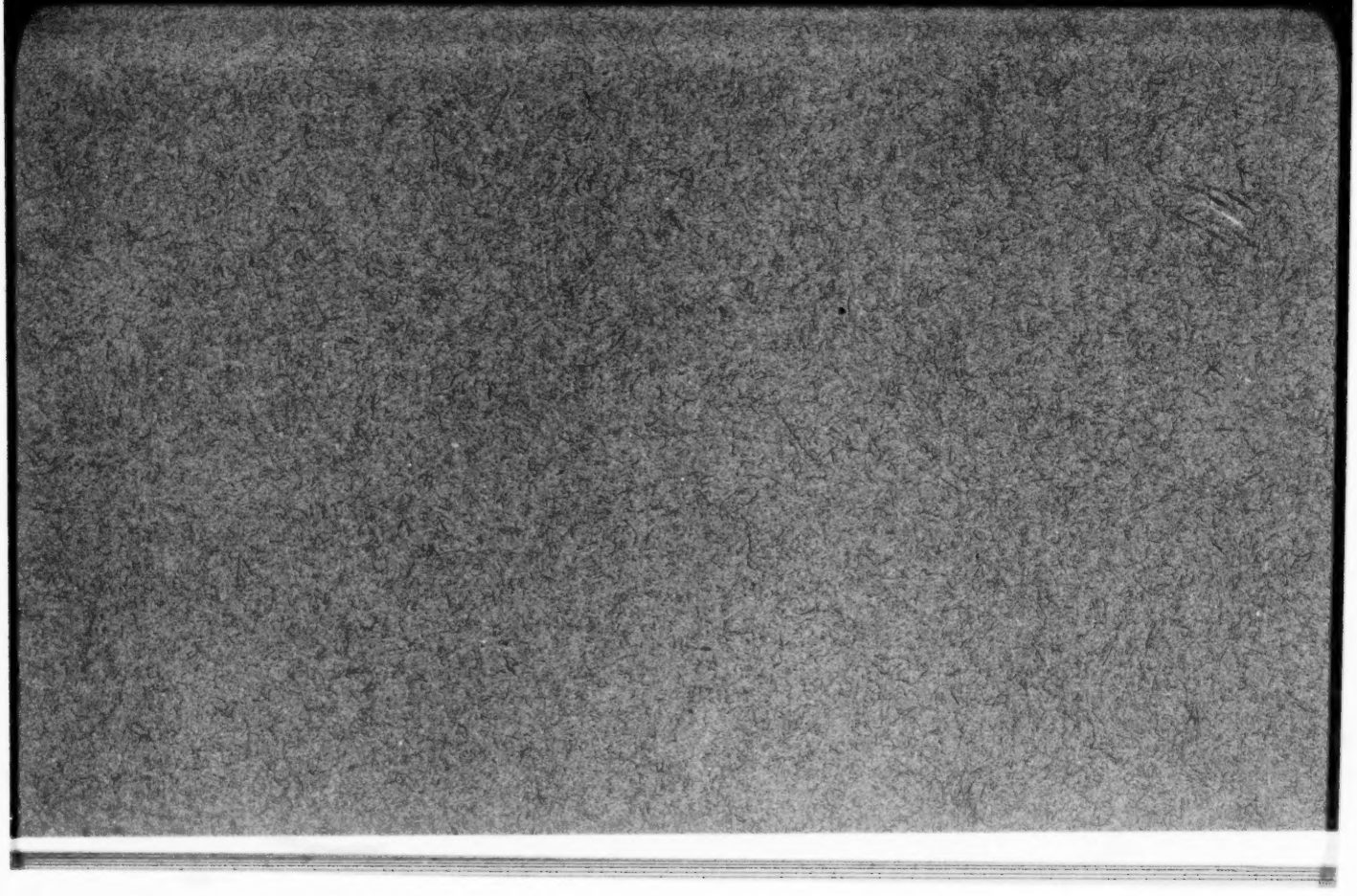

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 624

CAPE ANN GRANITE CO., INC., PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 33–38) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered October 4, 1943 (R. 38).[1] Petitioner's mo-

[1] On June 7, 1943, the court below issued Special Findings of Fact together with an opinion. Petitioner then moved for a new trial. The Government opposed the motion and asked the court to correct its error in holding petitioner entitled to a remission of $250 as liquidated damages for ten days' delay in completion. The court denied petitioner's motion and, pursuant to the Government's request, corrected its findings of fact and modified its opinion accordingly on October 4, 1943. The judgment here sought to be reviewed was entered the same day.

tion for a new trial was overruled on November 1, 1943 (R. 38). The petition for a writ of certiorari was filed on January 22, 1944 (R. 40). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether there is substantial evidence to support the findings of the court below that no material change requiring an equitable adjustment had occurred in subsurface or latent conditions subsequent to the time of the contract; that the velocity of the current, a matter affecting the difficulty of performance, was properly represented in the contract specifications; and that the weather during the period of performance had not been unusually severe, nor more severe than might have been expected.

2. Whether a change order accepted by petitioner and never protested, which stipulated that it in no way affected the completion date originally fixed, extended the time of performance under the contract.

3. Whether, after completion of the contract by petitioner and final payment thereunder by the Government, the refusal of the Secretary of War to review certain findings of fact made by the contracting officer under the contract, which if reversed would have merely entitled petitioner to additional payments, justified "rescission" of

the contract by petitioner and recovery in *quantum meruit*.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contract involved are set out in the Appendix, pp. 24-25, *infra*.

STATEMENT

Petitioner entered into a contract with the United States on October 11, 1935, to repair the jetties at the entrance to Newburyport Harbor, Mass., at a unit price of $2.88 per ton of rubblestone furnished and placed in the jetties (R. 5–6, 19).[2] Petitioner was given notice to proceed on November 7, 1935 (R. 25), fixing March 5, 1937, as the completion date. However, on November 15, 1935, the Government at petitioner's request suspended all work until April 1, 1936 "on account of unsuitable weather conditions," and extended the completion date accordingly to May 9, 1937 (R. 25; PR. 121).

Petitioner resumed work on April 18, 1936 (RR. 58), but after working for four days, ceased operations until June 1, 1936, in order to obtain a suitable tow-boat (PR. 70; RR. 59, 93, 133–137). After working until September 30, 1936, petitioner's equipment was withdrawn for repairs and work was not again resumed until late in March

[2] The unprinted record designated by petitioner is referred to as "PR"; the unprinted record designated by respondent, as "RR"; and the printed record, as "R."

1937 (RR. 152). During this period and subsequent thereto, petitioner requested several extensions of time and authority temporarily to suspend work on account of repairs to equipment, need to obtain additional equipment, "unseasonable weather" and "unusually rough seas" (R. 25–28; RR. 171 (Ex. 47); PR. 161 (Ex. F)).[3] The Government consented to temporary suspension until March 1, 1937, on the understanding that no extension of time on this account would be granted unless weather or natural conditions were found, upon "investigation," to have been abnormal and unusual (R. 25–27).

On August 13, 1937, in response to the petitioner's requests for extensions of time, the contracting officer wrote petitioner complaining of the lack of progress and pointing out that in 1937 only 2,000 tons per month were being laid, compared with an average of 5,000 tons per month in 1936 (R. 28; PR. 106 (Ex. 3)). Petitioner replied on September 14, 1937, blaming the lack of progress on "subsurface and latent conditions * * * materially differing from those shown on the drawings or * * * specifications; * * * unusually severe weather and sea conditions" and "inability to procure additional and suitable plant because of the reluctance of owners to expose their equipment to the hazardous conditions" due to changes caused by the flood of 1936 (R. 28; PR. 123 (Ex. 64)).

[3] Exhibits introduced by petitioner in the court below are identified by numbers; those by respondent, by letters.

On September 22, 1937, when 90% of the stone had been laid, the Government issued, and petitioner accepted, a change order modifying the shape of the mounds at the end of the jetties, with no extension of time or change in unit price because the change "will not increase the difficulty of placing the stone" (R. 16–18). Work was finally completed on December 22, 1937, or 227 days after the amended completion date (R. 25). The last payment at the unit price, minus liquidated damages for the delay was made January 6, 1938, and was received under protest by petitioner.

On August 22, 1938, petitioner wrote the contracting officer to request remission of the amounts withheld as liquidated damages, and additional compensation on account of changed subsurface conditions and of the change in the contract (R. 29, 30; PR. 132 (Ex. 73), 135 (Ex. 75)). On December 29, 1938, the contracting officer made findings of fact and denied both requests (R. 30; PR. 144–159 (Ex. 76, 85)). Petitioner sought to appeal his findings to the Secretary of War (R. 31; RR. 184 (Ex. 77)) who refused to consider the appeal, advising petitioner that the matter "must be referred to the General Accounting Office for direct settlement" because it was "filed subsequent to completion of the contract" (R. 31; RR. 186 (Ex. 78)). The General Accounting Office remitted $1,685 of the amount deducted for liquidated damages, because of the change

made in the original completion date by the first suspension order of November 15, 1936.

Petitioner thereupon brought suit in the court below to recover $5,675, the balance of the liquidated damages withheld, and $59,005 as additional compensation (R. 1–5). The alleged grounds for recovery were that the Government had misrepresented a sandbar and the average velocity of the current; that changed subsurface and latent conditions at the site of the work, unusually severe weather, and the delay in supplying the final specifications for the mounds, had delayed petitioner's performance without its fault, entitling it to the additional cost thereby incurred, a reasonable profit thereon, and remission of the amount deducted as liquidated damages. The court below found against petitioner on each item. It found that there had been no misrepresentation as to the sandbar (R. 19, 20, 34) nor as to the velocity of the current (R. 21, 22, 35); that there had been no change in subsurface conditions by reason of flood (R. 22, 23, 35); and that the claim last mentioned was an afterthought designed as an excuse for tardiness (R. 35). The court further found that the weather prevailing during the course of the work was not unusually severe or of an unexpected kind (R. 31–33, 37). While the refusal of the Secretary of War to review the findings of the contracting officer was denominated a breach of contract, the court held that a review of such findings showed that the

contracting officer had acted correctly in denying the various requests for extension of time (R. 37).

ARGUMENT

Petitioner contends that the findings of the court below in respect of current velocity, weather conditions and latent subsurface conditions are not supported by substantial evidence; that it has been denied due process because the court's findings are rested upon improper findings of the contracting officer; that the Change Order of September 22, 1937, annulled the liquidated damage provision of the contract; and that it is entitled to rescind the contract and recover upon a *quantum meruit*. We submit that these contentions are without merit and that the case was correctly decided below.

1. THE FINDINGS BELOW ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

(a) *Current Velocity.* The specifications provided that "the work is exposed to severe easterly storms. * * * The tidal currents have an average velocity of 2.1 miles per hour, which might have some effect on contract operations" (Appendix, p. 24 *infra*). Petitioner contends that the current velocity was understated (Pet. 21–22). There is, however, ample evidence to support the court's finding (R. 35) that the actual velocity was 2.08 miles per hour. The Government had made a scientific study of current velocity under various tidal conditions and over the full tidal

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cycle and the average stated in the specifications was the result of that study (R. 35; PR. 94–99, 163 (Ex. M); RR. 114–124, 191 (Ex. L)). The only opposing testimony consisted of statements by various mariners based upon observation and surmise (PR. 73; RR. 67, 121, 122). Error cannot be predicated upon resolution of conflicting testimony in favor of the Government. *Lytle* v. *State of Arkansas,* 22 How. 193, 207; *Adamson* v. *Gilliland,* 242 U. S. 350.

Moreover, petitioner became aware of the effect of the current on working conditions as soon as it commenced work; yet in all the extensions of time requested prior to September 1937—almost two years after the contract was signed—no allusion was made thereto as the cause for the delay. If there had been any misrepresentation, it had long since been waived by petitioner (*Upton* v. *Tribilcock,* 91 U. S. 45, 54; *Church* v. *Swetland,* 243 Fed. 289 (C. C. A. 2), appeal dismissed, 249 U. S. 579).

(b) *Representation as to Sandbar.* Petitioner cites the provision in the specifications that "There are no bridges or other obstructions between the proposed work and the sea" and claims that this was a misrepresentation because a sandbar existed in front of the harbor, impeding the work (Pet. 4). This claim was rightly rejected below. The map accompanying the invitation to bid showed a channel in the harbor and contained the word "Bar" (RR. 51, 52, 107, 108); para-

graph 1 of the specifications stated that the location of the work "is shown on United States Coast & Geodetic Survey charts Nos. 331 and 1206", which depicted the sandbar in front of the harbor and the same channel through the bar as was indicated upon the map accompanying the bid (R. 20). The bar was well known among mariners;[4] it could have been discovered by the most cursory examination (PR. 61); and the president of petitioner, a civil engineer with prior experience in building breakwaters, visited the site of the work for some four hours prior to submitting his bid (PR. 81) and took the bar into consideration in making his bid (PR. 85). Clearly, there was no misrepresentation.[5]

(c) *Changed Subsurface Conditions.* Article 4 of the contract (Appendix, p. 22 *infra*) provides that "Should the contractor encounter * * * during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the

[4] R. 20; RR. 28, 35, 50, 51, 71, 74, 78, 95, 128, 166.

[5] The standard government instructions admonished bidders that "Special care should be exercised in the preparation of bids. Bidders must make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies" (R. 20; RR. 112, 189 (Ex. C)). The specifications stated that "No allowance will be made for failure of a bidder correctly to estimate the difficulties attending the execution of the work" (PR. 117 (Ex. 38)).

contracting officer shall be called immediately to such conditions", and if the latter finds that they differ materially from those indicated in the specifications, he shall, subject to the approval of the head of the department, adjust the cost and time under the contract.

Petitioner contends (Pet. 17–18) that a change occurred in the sandbar as a result of the 1936 flood in the Merrimac River, changing the conditions at the site and requiring an adjustment under Article 4. But the changed conditions which resulted from the March 1936 flood occurred before any work had been done on the jetties, and not until a year and a half later were such changes cited by petitioner as justifying the delays in the completion of the contract (R. 34). This is scarcely the immediate action called for by Article 4. *Sanford & Brooks Co.* v. *United States,* 267 U. S. 455. Moreover, the court below properly found that there had been no material changes in the subsurface or latent conditions as a result of the flood (R. 20–22), for while the minimum depth of water over the bar had decreased, the minimum depth of the channel through the bar—the only factor having any effect on operations—had remained substantially unchanged.[6] In any event, the court

[6] A survey made in July 1936 by the Department of Commerce showed the minimum depth of water over the bar to have decreased from seven to four feet, but the shallowest depth of the channel through the bar had merely changed from ten feet prior to the flood to 9.5 feet (R. 22; PR. 157 (Ex. 85)).

found and the evidence shows that the sandbar was constantly shifting in extent and depth, the channel through it being equally inconstant, and careful mariners had always taken soundings prior to crossing it (R. 20; RR. 16, 17, 44, 45, 98). This well-known fact, coupled with the warning to bidders (see p. 9, n. 5, *supra*), leaves no room for any contention that changes in the bar were unexpected, even had they been substantial.

(d) *Weather Conditions.* Article 9 of the contract (Appendix, pp. 22–23 *infra*) which requires the contractor to pay liquidated damages for each day of delay in completing the work, provides that such damages shall not be assessed for "unforeseeable" causes, including "unusually severe weather." A proviso to Article 9 states that

> the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts or delay shall be final and conclusive on the parties hereto (R. 8).

Petitioner had consistently sought extensions of time under Article 9 on the asserted ground that it had encountered unusually severe weather while

repairing the jetties. To determine the merit of this claim, the contracting officer tabulated, from reports submitted by Government officials in connection with previous repairs of the jetties, the number of days in each month on which work had been done in other years. Comparison of these figures with the days on which work could have been done in the years 1936 and 1937—the period during which petitioner was engaged in repairing the jetties—showed that weather and sea conditions for the two years combined had been slightly better than average, that for 1936 being above, and that for 1937 being slightly below average.

The court, in reviewing the findings of the contracting officer and the tables on which they were based, stated itself to be "satisfied that he acted correctly in denying plaintiff's request for extensions of time on account of unusually severe weather" (R. 37) and specifically found that the weather during the period of the performance of the contract was not unusually severe or more severe than reasonably might have been expected (R. 33).

There is no merit in petitioner's contention that the court denied it due process in "adopting" findings made by the contracting officer without a hearing or the right to cross-examination (Pet. 16). Nothing in the contract or in any rule of law requires that the contracting officer, before he makes findings of fact, must hold a hearing or afford the contractor a right of cross-examina-

tion; and the consistent practice under a provision such as Article 9, giving finality to the contracting officer's findings of fact, has been not to hold any hearing. Cf. *Kihlberg* v. *United States,* 97 U. S. 398; *United States* v. *Callahan Walker Constr. Co.,* 317 U. S. 56, 59.

Moreover, the findings below show that the court did not "adopt" the contracting officer's findings but rather independently determined that the weather during the period of performance had not been unusually severe (R. 33, 37). Petitioner cannot complain that in making such determination the court relied in part on statements in documents introduced by petitioner itself into the record (PR. 83). *Chicago & E. I. R. Co.* v. *Collins Prod. Co.,* 249 U. S. 186; *McGillin* v. *Bennett,* 132 U. S. 445; *Avendano* v. *Gay,* 8 Wall. 376. And apart from the findings of the contracting officer, there is ample evidence in the record that the delays were not due to the weather.[7]

[7] The record shows that had work been performed at an average rate on all the days on which weather and sea conditions permitted, the contract would have been completed well within the time originally fixed (RR. 146, 151–156, 160). Petitioner resumed work under the contract on April 18, 1936, but no work was done in May because the tow-boat first employed was found unsuitable for work around the jetties (RR. 59, 93, 133–136; PR. 70, 74), and another boat did not arrive until June 1, 1936 (RR. 137). In the course of the succeeding months (June, July, August, and September) more than half the total tonnage placed under the contract was disposed (RR. 145), but on the last day of September the equipment used in the work was withdrawn for repairs (RR. 141; PR. 88) and no work was done be-

Furthermore, proof that the weather was severe does not alone justify petitioner's dilatory performance, for the contingencies enumerated in Article 9 as releasing contractor from liability from liquidated damages must be unforeseeable. *United States* v. *Brooks-Callaway Co.*, 318 U. S. 120. The specifications call petitioner's attention to the fact that "the work is exposed to *severe easterly storms*" [Italics added] and it was required in bidding on the job to take into account the uncertainty of the weather (R. 37). The severity of the weather not being unforeseeable, the court properly held that petitioner could not claim an extension of time on that account.

2. THE CHANGE ORDER DID NOT ANNUL THE LIQUIDATED DAMAGE PROVISION OF THE CONTRACT

Article 3 of the contract (Appendix, pp. 21–22, *infra*) provides that if the Government orders any changes in the specifications which affect the amount due under the contract or the time required for its performance, an equitable adjust-

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tween September 30, 1936, and late in March 1937. An extension to March 1, 1937, to "obtain additional equipment" was asked and granted (R. 26; PR. 122 (Ex. 53); RR. 174 (Ex. 52)), but not until the latter part of March 1937 was work resumed, although weather conditions would have permitted work during the intervening months (RR. 92, 152–155, 192–205 (Ex. N)). A breakdown of equipment prevented work during several days in July (RR. 153). On August 13, the contracting officer complained of the unsatisfactory progress, pointing out that during 1937 only 2,000 tons a month were being laid as against an average of 5,000 tons per month during 1936.

ment shall be made, but claim therefor must be asserted within ten days from the date the change is ordered. Pursuant to this provision, a change order was issued by the Government and accepted by petitioner on September 22, 1937, altering the specifications in respect to the shape of the mounds at the ends of the jetties. The order stated that since the change would not increase the difficulty of placing the stone, no additional time would be allowed nor would the unit price be changed. The order was accepted by petitioner's president (R. 16–18).

Petitioner now contends that the delay for which liquidated damages were charged, was due to this change order, and hence should be remitted (Pet. 19–21). The facts refute this contention.

At the time the change order was issued, approximately 10 percent of the total tonnage placed had still to be laid (RR. 68, 92), and of this tonnage less than half was thereafter placed on the jetty mounds, the remainder being used along the jetties (PR. 158 (Ex. 85)). No claim for additional time or compensation on this account was made until almost a year later, when on September 21, 1938, petitioner complained that the change in specifications had caused delay in completing the repairs (PR. 135, Ex. 75). The commissioner of the Court of Claims who took the evidence and heard the witnesses found that the change

order did not hinder or delay petitioner in the completion of the contract, except in so far as the latter may have withheld at its own election the placing of stone on the mounds (C. Cls. Rec. 42). And while the court below made no finding as to the effect of the change order, its decision implicitly rejects petitioner's contention that the order annulled its obligation to pay liquidated damages for delay.[8]

Petitioner complains of the absence of any finding on this point below (Pet. 19–21). But since nothing in the facts surrounding the issuance of the change order would have affected its plain terms, petitioner was not prejudiced by the omission of any reference thereto in the findings of fact. *Sun Co.* v. *Vinton Petroleum Co.*, 248 Fed. 623, 626 (C. C. A. 5), certiorari denied 247 U. S. 514; *Kustoff* v. *Chaplin*, 120 F. (2d) 551, 559 (C. C. A. 9). In reaching its conclusion that liquidated damages had correctly been assessed, the court was under no obligation to explore every factual issue raised by petitioner, however insubstantial. Cf. *Bryant Paper Co.* v. *Holden*, 63 F. (2d) 370 (C. C. A. 6). Certainly, there is no

[8] The argument that the acceptance of the modification was without consideration is completely without merit. The change made was authorized by Article 3 of the contract, and the contract price related as much to the privilege of making it as to any other provision in the contract. *Griffiths* v. *United States*, 74 C. Cls. 245, 255; *Harrison* v. *City of Tampa*, 247 Fed. 569 (S. D. Fla.). Moreover, the promise to pay the agreed unit price per ton for the additional stone called for by the change in the specifications was sufficient consideration for its acceptance by petitioner.

reason to remand a case when the findings sought would not avail the party seeking them. *Sanford & Brooks Co.* v. *United States,* 267 U. S. 455.

3. PETITIONER IS NOT ENTITLED TO RESCIND THE CONTRACT AND RECOVER IN QUANTUM MERUIT

Article 9 of the contract, which imposes liquidated damages on account of delay in completing the work except where that is due to unforeseen causes, empowers the contracting officer to "ascertain the facts and the extent of the delay." Article 15 of the contract empowers the contracting officer to decide "all disputes concerning questions of fact arising" under the contract. Both articles provide that the findings or decision of the contracting officer as to questions of fact shall be "final and conclusive," subject to appeal to the head of the department, whose decision on such questions shall be final and conclusive (Appendix, pp. 22–24 *infra*).

Petitioner presented to the contracting officer its claims for remission of liquidated damages on account of allegedly unforeseen causes, and for additional compensation on account of allegedly unknown conditions at the site. The contracting officer made findings of fact and rejected both claims. Petitioner appealed to the Secretary of War, but the latter refused to act on the appeal on the ground that the matter was solely for the General Accounting Office. The court below styled this a "breach of contract," but held that on

the merits petitioner's claims were unfounded (R. 37). Because of the failure of the Secretary of War to review the findings of the contracting officer, petitioner now contends that it was entitled to rescind the contract and to recover for the work done in *quantum meruit* (Pet. 10, 13–15). This is entirely without merit.

It is doubtful whether the Secretary's refusal to review the findings of his subordinate was a "breach of contract," for the stipulation concerning review is not stated in the form of a promise, but rather as a qualification upon the finality of the contracting officer's findings (see Appendix, pp. 23–24 *infra*). Refusal to review would at most deprive such findings of their finality; it would hardly constitute a breach of any duty to petitioner. Cf. Williston & Thompson, *Contracts*, Rev. Ed., § 677.

Even if it was a breach of contract, rescission does not automatically follow. A breach justifying rescission must go to the root of the contract and must be so substantial and fundamental as to defeat the object of the contracting parties. *Loudon* v. *Taxing District*, 104 U. S. 771; *Kaufmann* v. *Raeder*, 108 Fed. 171, 179 (C. C. A. 8). If the breach, as here, is of an incidental and subordinate part of the contract, rescission is not warranted. *In re Waterson, Berlin and Snyder Co.*, 48 F. (2d) 704 (C. C. A. 2); *Callanan* v. *Keeseville, etc. R. Co.*, 199 N. Y. 268. And it is

settled that where the breach consists of a failure to pay money due for completed performance, the party who has fully performed is not entitled to rescind the contract and recover for work done on a *quantum meruit* basis. *Restatement, Contracts,* § 350; Williston & Thompson, *Contracts,* Rev. Ed., § 1459; see *Dermott* v. *Jones,* 2 Wall. 1, 9. Here, petitioner's complaint lies in the Government's refusal to pay him a liquidated sum alleged to be due under the contract; the refusal of the Secretary to review the contracting officer's findings was merely denial of a procedural step which might lead to the administrative award of that sum. Petitioner plainly had no interest in the review as such.[9]

CONCLUSION

The case presents no questions requiring review by this Court. The only substantial question is whether the facts entitle petitioner to additional compensation and to remission of liquidated damages, and as to this issue the record amply supports the judgment below.

[9] Petitioner's intimation (Pet. 13) that the contracting officer's failure to investigate subsurface and weather conditions promptly after complaint also constituted a breach of contract, adds no weight to his alleged right to rescind. For even if the delay had that effect, rescission should have taken place reasonably soon after the "prompt" investigation was not forthcoming. Certainly, petitioner cannot complete the work and then seek to rely upon a fact by which he was uninjured, in order to obtain a more favorable measure of payment than the agreed contract price.

We respectfully submit that the petition for writ of certiorari should be denied.

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MARCH 1944.